Mammoth Mountain Ski Area *and* International Union of Operating Engineers, Local 12, AFL–CIO. Cases 32–CA–20513-1 and 32–CA–20514-1

August 20, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND MEISBURG

On April 21, 2004, Administrative Law Judge James M. Kennedy issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief, and the Charging Party filed a brief in opposition to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified below.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Mammoth Mountain Ski Area, Mountain Lakes, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Insert the following as paragraph 2(d).

"(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply."

Dated, Washington, D.C. August 20, 2004

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Ronald Meisburg, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

George Velastegui, for the General Counsel.

Thomas P. Brown IV (with *Lauren A. Dean* on brief), *of Epstein, Becker & Green*, of Los Angeles, California, for the Respondent.

David P. Koppelman, of Los Angeles, California, for the Charging Party.

DECISION

JAMES M. KENNEDY, Administrative Law Judge. This case was tried in Mammoth Lakes, California, on December 9–10, 2003,[1] based upon a complaint issued June 30, by the Acting Regional Director for Region 32. International Union of Operating Engineers, Local 12, AFL–CIO, filed the underlying unfair labor practice charges on April 16. The complaint alleges that Mammoth Mountain Ski Area (Respondent or the Mountain) independently violated Section 8(a)(1) of the National Labor Relations Act (NLRA) by prohibiting employees from placing union stickers on lockers under pain of discipline and telling employees that union representation would result in less work for less senior employees under a union contract. It also alleges Respondent violated Section 8(a)(3) and (1) of the Act by downgrading periodic employee evaluation scores for two employees because of their union organizing activities. Respondent denies the 8(a)(1) conduct. At the hearing it asserted that the evaluations were only employee feedback having no bearing on hire and tenure as set forth in Section 8(a)(3) for they did not constitute an adverse employment action. In its brief it now adds that the General Counsel failed to prove that the evaluations were motivated by union animus and that the ratings were honestly given.

The parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to orally argue and to file briefs. The General Counsel, the Charging Party, and Respondent have all filed briefs which have been carefully considered. Based upon the entire record

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In addition, some of the Respondent's exceptions imply that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

Finally, the Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] We agree with the judge that the Respondent's downgrading of Briant Phillips' and Dennis Barger's employee evaluations violated Sec. 8(a)(1). We find it unnecessary to decide whether the Respondent's conduct also violated Sec. 8(a)(3), because finding the additional violation would not affect the remedy.

[3] We have added the requirement that the Respondent certify to the Region what steps it has taken to comply with the Order, which the judge inadvertently omitted.

[1] All dates are 2003 unless otherwise stated.

of the case, as well as my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

According to the pleadings, Respondent is a California corporation with an office and place of business in Mammoth Lakes, California, where it operates a recreational ski resort. It admits that during the 12-month period ending June 30, 2003, in the course and conduct of its business its gross sales volume exceeded $500,000 and it purchased and received goods originating outside California valued in excess of $5000. Accordingly, it admits it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. It further admits the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

At Mammoth Lakes Respondent operates, during the ski season, two ski schools. The resort is widespread and one of the schools is located at the Main Lodge. The other, the focus of this complaint, is located at Canyon Lodge. All of the alleged unfair labor practices occurred there during the 2002–2003 season. Canyon Lodge alone employs 120 ski instructors.

As the 2002–2003 season began to get underway, the Union commenced an organizing drive among the Mountain's ski instructors and equipment operators. Professional organizer Pam Mitchell led the drive. She lives in the general area. Early on she enlisted the help of instructor Briant Phillips; later instructor Dennis Barger became active in the drive. In addition, three other instructors (two at the Main Lodge and one at Canyon Lodge) were also active early but are not the focus of the complaint.[2] Phillips is a veteran, having worked 11 years as a Mountain instructor. The 2002–2003 season was Barger's first for Respondent. Mitchell said that Phillips and Barger were responsible for collecting about 90 percent of the authorization cards which were turned in, although whether that number is small or large is not shown in the record. Neither an election petition nor a recognition demand appear to have been filed or made during the time period under scrutiny here.

The instructors at both Canyon Lodge and the Main Lodge are overseen by means of groups. Respondent calls these groups 'families.' During this season Canyon Lodge had either five (per Carl Underkoffler) or six (per Cara Leonard) families, run by admittedly statutory supervisors. Two of them, Mark Spieler and Christian Vanderslice are alleged to have committed independent acts constituting violations of Section 8(a)(1) of the Act. In addition, Respondent, as an institution, due to the manner in which its periodic employee evaluations are conducted, is alleged to have violated Section 8(a)(3) and (1) by downgrading the evaluations of both Phillips and Barger in the "team player" and "attitude" categories set forth in the evaluation form because they were organizing on behalf of the Union. All of the Canyon Lodge supervisors are said to have had input into each evaluation. Carl Underkoffler was the supervisor who delivered the mid-season and season-end evaluations to Phillips. Cara Leonard delivered the season-end evaluation to Barger.

B. The Evidence

Although Phillips actually began his organizing tasks in late 2002, the Union did not notify Respondent who was actually involved until its attorney wrote a letter on February 3, listing the names of its activists. Five individuals, including Phillips were on the list. Almost 2 months later, by letter dated March 31, the Union's attorney added Barger to the group. However, Barger had already announced his union sentiments by wearing an IUOE button beginning in early March.

Spieler Speaks to Barger

In addition to the button, Barger placed a union sticker on his locker located in the staff locker room. He says he put it up several times, but it was mysteriously removed on each occasion. Notably, the locker room is fraught with stickers of all types. Instructors using the room commonly place all kinds of stickers on lockers. The stickers cover a wide range from ski equipment manufacturers, political messages, sports teams, radio stations, beer advertisements, and environmental messages to whimsical commentary. Supervisor Christian Vanderslice called it "a little montage of pop culture." The lockers have been treated that way for many years. Barger's small (2" x 3") "Live Better **Local 12** Work Union" sticker hardly stood out from the others. He never learned who was removing his stickers.

In early March, Supervisor Mark Spieler noticed Barger wearing his Local 12 pin while both were in the locker room. Spieler asked if they could talk for a moment and Barger agreed. Barger testified:

> (WITNESS BARGER) And he said, he asked what I assume was a rhetorical question, have you research[ed] this union stuff. I said, Yes. I believe I said Yes. And, anyway, he said, well, if you—if you really researched it more, and you should research it more, you would find out that it's really not a good idea for ski instructors.
>
> Q (BY MR. VELASTEGUI) And did he say anything else?
>
> A He went on to say that, well, to ask again a rhetorical question. Did I know why Briant, one of our ski instructors, was really organizing the Union and why he wanted the union there.
>
> And he said, the reason was that Briant, as the organizer, would get more hours, also because of being there longer, and that people like me, who had less hours with the company, would get fewer hours and less work if the Union were to be allowed have a contract.

On cross Barger was able to be more specific:

> Q (BY MR. BROWN) He mentioned a union contract; didn't he?
>
> A I guess so.
>
> Q I don't want you to guess.

[2] Another employee organizer operated ski slope grooming equipment.

A I believe.

Q Okay.

A We talked about the fact the word contract.

Q And didn't he—doesn't that refresh your recollection that Mr. Spieler informed you that during negotiations leading up to a union contract, the union would in all likelihood try to get a premium placed upon seniority?

A There was a discussion about preferential treatment by the Union, Yes.

Q And the preferential treatment was related to two factors; was it not? Number one, seniority, and, number two, being a union steward?

A Yes, I think that's accurate.

Q Okay. He pointed out to you that a union would try to get super seniority for its union stewards; correct?

A Yes.

Q And he explained to you that superseniority would give them protection with respect, among other things, to layoff and job assignments; correct?

A Yes.

Q And he explained to you that seniority, just plain seniority, would afford people with more longevity perhaps greater opportunities as it related to protection from layoffs and job assignments; correct?

A Would you repeat that question?

Q And he told you that simple seniority would be used by a union in an effort to get people with more longevity greater protection as it related to protection from layoffs and opportunity for job assignments?

A I can't say one way or the other. I can't agree one way or characterize it one way or the other the exact way that you have expressed it.

Q I appreciate that. And I appreciate your honesty. He also—but, nonetheless, you do agree he told you you should do some research because as a new employee you may be disadvantaged as it related to people with more seniority in a union contract; correct?

A I think he implied that. I'm not sure he said it exactly.

Spieler is a long time Mountain employee. He was originally hired in the mid-1980s and has been a supervisor since 1991. Respondent called him to testify to his recollection regarding what he said to Barger. He testified on direct:

A (WITNESS SPIELER) I told Dennis—I had a conversation—short, brief conversation with Dennis, and I said that do you—you should research this union thing.

. . . .

Q BY MR. BROWN: What, if anything, did you say to Mr. Barger on the subject of collective bargaining?

A I said to Dennis that you should research this union thing and—I'm trying to say it in little bites here.

ADMINISTRATIVE LAW JUDGE KENNEDY: That's all right.

THE WITNESS: And I said that, for example, Briant Phillips, being a union organizer, should the Union be voted in, would then become a shop steward. And if that took place, then he can have work priority over other instructors.

On cross, Spieler elaborated:

(BY MR. VELASTEGUI) Is it your testimony that in this time period when you had this meeting, you were aware that Mr. Barger was actively involved in the union organizing?

A No, that's not true. I did not know that at all.

Q Okay. So at the time that you spoke with Mr. Barger, you had no idea which way he was leaning with respect to this union organizing; is that your testimony?

A Yes.

. . . .

Q . . . you initiated this conversation; didn't you?

A Yeah, I think I did.

Q You called him and said, hey, can I speak to you, Dennis? What? [sic]

A No. No.

Q Okay. Well, how did you initiate this conversation then?

A I just [pause] He was sitting in the same row. I was changing. I was getting, you know, getting off of work, and I saw he had a union button on. And I said, hey, how's it going, you know. But I don't remember exact words. But I would have said something like, hey, do you know what's going on with this union thing? You should check this out.

Q That's what you said?

A As best of my recollection.

Q I see. So you didn't say anything about research. You said to check this out?

A You know, it was a long time ago. I don't remember exactly the words. But it was definitely something like you should, you know, investigate the situation and find out what it—what this is all about.

Q So you knew at the time of this conversation, because he was wearing a union button, you knew he was supporting the Union; correct?

A. No. I did not know he was supporting the Union. I did not assume that.

. . . .

Q BY MR. VELASTEGUI: Okay. Did you believe he was a union supporter at that point?

A No.

Q Yet you asked him that he should look into this and investigate it further; correct?

A Yes.

Q That was your statement to him?

A Yes.

Q All right. And prior to this meeting with him, had you ever seen Operating Engineers Local—any collective bargaining agreement wherein Operating Engineers Local 12 was a party? Had you ever seen such a contract?

A A contract?

Q Yes.

A Have I seen a contract for the—

Q Operating Engineers and some employer?

A I have not seen a contract, No.

Q All right. So you're not familiar with the terms or the conditions of any of the Operating Engineers Local 12's contracts; correct?

A That's not—I have been introduced to some of the outcomes of a positive union vote. One of those being what I before mentioned as the role that a shop steward would play.

. . . .

Q I want to know how you initiated that conversation, and then I'm just going to go to the end. I just want to make clear everything you said to him on this occasion. Could you please just tell us what you said to him and what he said to you?

MR. BROWN: I'll object as being asked and answered.

ADMINISTRATIVE LAW JUDGE KENNEDY: Overruled. Overruled.

THE WITNESS: I said, Dennis—again, I don't know the exact words—you know, I can't say that this was a quote—but I said, you need to—I would suggest you research the ramifications of a Union coming in to the ski school or the sports school. You know, there are some ramifications. For example, Briant Phillips, who is a union organizer, he would get—he could get. If the union became—had a positive vote, he could become a shop steward and that would mean that he could get work priority over everybody else in the school. All the other instructors.

Q BY MR. VELASTEGUI: What else did you say or did he say?

A He didn't say anything.

Q He didn't respond to anything you said?

A Not really.

Q Well, when you say not really, that tells me that he may have. So—

A He had a funny look on his face, actually.

Q Okay.

A That's the only response that he had.

Spieler then answered some questions from me:

ADMINISTRATIVE LAW JUDGE KENNEDY: Okay. Let me say—before I turn—ask Counsel if he has some questions, which I'm sure he does, I just want to cover something [you said] a minute ago about your background and the state of your knowledge about unionization and all of this. You said you'd never seen a collective bargaining contract from the Operating Engineers; is that right?

THE WITNESS: Yes.

ADMINISTRATIVE LAW JUDGE KENNEDY: Have you ever seen a collective bargaining contract from anybody—from any other union?

THE WITNESS: I was—

ADMINISTRATIVE LAW JUDGE KENNEDY: Yes or No?

THE WITNESS: I—maybe. I mean—

ADMINISTRATIVE LAW JUDGE KENNEDY: You don't have it in your head right now that you did?

THE WITNESS: No. No, but I was a member of a union once, and I—in that course, I could have perhaps seen one then.

ADMINISTRATIVE LAW JUDGE KENNEDY: Okay. And [do] you have any knowledge about how the Operating Engineers—any knowledge about the Operating Engineers' policies concerning who they select as stewards or how they go about selecting stewards?

THE WITNESS: I had been—

ADMINISTRATIVE LAW JUDGE KENNEDY: Of the Engineers. Not what—Yes or No, do you have any knowledge about it?

THE WITNESS: Of the Operating Engineers' Union? Could you repeat the question one more time because I want to—

ADMINISTRATIVE LAW JUDGE KENNEDY: Do you have any knowledge about how the Operating Engineers goes about selecting its shop stewards?

THE WITNESS: From—only from what I have been told. Not from personal knowledge.

ADMINISTRATIVE LAW JUDGE KENNEDY: And the source of what you were told was what?

THE WITNESS: Was the Human Resources Department at Mammoth Mountain.

On redirect examination Spieler concluded saying:

Q BY MR. BROWN: What union were you a member of?

A It was—I was a grocery employee in the early eighties, I believe.

Q Okay. So you worked for retail clerks or something like that?

A Yes.

Q Okay. And did you have experience with respect to how retail clerks attempted to reward shop stewards?

A No. I didn't.

The upshot of this testimony is that Barger has accurately testified that Spieler took him aside and, without regard to its accuracy, told Barger some negative things about the Union. He told Barger that the persons who would benefit from union representation were those instructors who had the greatest seniority. Then he embellished by telling Barger that the principal beneficiary would be the superseniority granted to the shop steward, who he said would likely be the chief organizer, Phillips. All this information came from a source he did not reveal to Barger, the Mountain's human resources department.

Furthermore, I find Spieler to have been disingenuous and less than forthcoming in several respects. He testified that he did not know what Barger's union preferences were, despite the fact that he saw Barger's union button. Second, he grudgingly acknowledged telling Barger to research the question of whether union representation was a good idea, but then proceeded to provide Barger with unsolicited, scripted, research provided to him by Respondent's human resources department. Clearly, research on such a weighty matter is important. Just as clearly, presenting the company line as if it met that need is being deceitful. Third, he claimed expertise about union representation when he had none. He asserted, long before specific

contract provisions could even be contemplated (since the Union was not yet the 9(a) representative), that the contract would contain a seniority and superseniority system which would be detrimental to junior employees such as Barger and specifically benefit union organizer Phillips. To the extent Spieler denies a coercive effort here his denial is rejected. Indeed, much of his testimony, both on direct and cross supports the version alleged by the General Counsel.

This evidence persuades me that the General Counsel has proven that Respondent, acting through Spieler, subtly threatened Barger with the specter of lost job opportunities both because he was wearing a union pin and because it wished to deter him from supporting the Union. This is a direct interference with the right to organize a union as guaranteed by Section 7.[3] Accordingly, I find that conduct to have been in violation of Section 8(a)(1) of the Act.

Christian Vanderslice Speaks to Assembled Employees

As noted above, the staff lockers are replete with a wide variety of stickers. Respondent, over the years has said nothing about it even though some of the stickers are difficult to remove. No rules have ever been established concerning the stickers, although pornographic or race-biased matters would have been addressed. In addition, each employee is assigned a specific locker and it is tagged with his name. And, as noted, Barger placed (and replaced) a small union sticker on his locker in late February or early March. Even earlier, he had placed an "Atomic" ski sticker there as well.

On March 29, Supervisor Christian Vanderslice presided over a regularly scheduled meeting of all instructors at Canyon Lodge. The meeting was held outdoors in the ski school meeting area. Styled as a "safety meeting," in actuality it is a periodic staff meeting designed to cover subjects beyond safety, including adherence to company policies and the like. Both Barger and Phillips attended the meeting together with about 60 other instructors.[4]

Barger testified that toward the end of the meeting, Vanderslice told the group that union stickers were not permitted on the lockers; that doing so could be considered defacement of company property and could subject the offender to disciplinary action. He testified that Vanderslice went on to say that a more appropriate place for them would be on vehicle bumpers. Similarly, Phillips recalled that toward the end of the meeting Vanderslice said, "Do not put stickers, union stickers on the lockers. That they are Mammoth Mountain's property."

Vanderslice agrees that he mentioned the subject of union stickers on lockers at the meeting, but said he was addressing a different problem. He says he told the group that they could not place union stickers on *other people's lockers.* He says he did not bar instructors from putting stickers on their own lockers. His testimony is not corroborated by any other witness, although some of the 60 or so employees and supervisors undoubtedly could have been called to testify.

Much of Vanderslice's concern derived from an observation made earlier in the month that union stickers and flyers were appearing in the locker room. He says he had asked Human Resources Executive Director Jack Copeland about the proper way to handle them. Copeland, he says, told him that flyers were permitted but they needed to go on the bulletin board ("brochures, flyers are permitted provided that they are put in the appropriate place. We have a bulletin board in the locker room that if anybody's selling anything, they need a ride to Los Angeles . . ." (i.e., be discharged).[5] With regard to stickers Vanderslice said only that Copeland would permit them if in "appropriate" places. There was no other specificity.

Vanderslice then testified that an employee, he no longer recalled who, had come to him holding a union sticker he had apparently removed and told Vanderslice he was not happy about someone putting it on his locker. Vanderslice said it was this incident which led him to bring the matter up at the March 29 meeting. When cross-examined regarding the identity of the employee he gave the following testimony:

> Q (BY MR. VELASTEGUI) Who was that employee?
>
> A That's what I am trying to remember, and I—at the time I thought it was a really minor incident. And I didn't—I cannot give you the exact name of the employee. I've tried to remember who it was, and I cannot remember.
>
> Q So you can't give me an exact name, you can't give me a name, period; right? First or last?
>
> A I would not want to venture a guess on who it was. Who brought it to me.
>
> Q All right. So you don't recall as you sit—right now, you don't know who it was?
>
> A Correct.
>
> Q You don't remember. Right?
>
> A That is correct.

Also on cross-examination, Vanderslice added:

> Q (BY MR. VELASTEGUI) Did—did you explain—during this meeting did you explain to employees why

[3] In pertinent part Sec. 7 states: "Section 7 of the Act states: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ."

[4] Respondent argues that Phillips did not attend, because he testified that the meeting was on March 24, not March 29, and because Phillips' signature does not appear on the sign-in sheet. I find that contention to be without merit. Phillips said he attended and he testified about what Vanderslice said. At worst he was mistaken regarding the date (Vanderslice only spoke to the assembled employees once in late March) and failed to sign the attendance sheet. Respondent argues that everyone signs the sheet under pain of not getting paid. That argument is specious. If an instructor's timecard shows the hours, Respondent is obligated to pay wages for that timeframe. The attendance sheet information does not change that obligation. Furthermore there is no contention that Phillips was denied pay for that time.

[5] Threatening to discharge someone for a flyer offering items for sale not on the bulletin board seems to have been a strange thing to say, whether Copeland actually said it or whether Vanderslice only claimed Copeland said it. Several ski instructors were sales representatives for ski manufacturers and had attached clipboards with purchase order forms to their lockers (or in Steve Erlanger's case, to an adjacent locker). The instruction, as reported by Vanderslice, would have prohibited that practice. Yet it was clearly allowed.

they were not allowed to put stickers on other employee's lockers?

A I can't remember. It was seven months ago. I said—I think my words were, it's been brought to my attention that stickers are appearing on other people's lockers, and that is—were unsolicited. And that we need to stop that at that time, and I did not say exactly this is—we're creating a hostile work environment or something like that.

Q You said you did say that?

A No, I did not mention the—I did not mention a reason. I asked people not to put them on other people's lockers.

Q And is that all you said at this meeting regarding that subject?

A I asked people to refrain from doing it. Find an appropriate forum. That it could be considered defacing Mountain property. It is—signs on the lift towers, don't put stickers on there. And because that is defacing property. Asked if there was any questions. And then I moved on.

Q And is that all that you said regarding this subject during this meeting?

A To the best of my recollection, Yes, it is.

Q All right. Did you define what you meant by an appropriate forum?

A The—No, I said—I suggested the bumper of your car. Not being sarcastic at all, but that was a place where it would get a lot of attention. But more an appropriate forum.

. . . .

Q BY MR. VELASTEGUI: Okay. Did you—you were aware at the time of this meeting that Mr. Barger—Barger, excuse me, had posted a Union sticker on his own locker? You were aware of that; correct?

A No.

Thus, the principal difference between the employees' testimony and Vanderslice's is that Vanderslice contends he only told the assembly they could not post union stickers on lockers other than their own. Barger testified that the subject of other people's lockers did not come up during Vanderslice's meeting, conceding he didn't recall that as having occurred. Phillips also testified that Vanderslice did not raise the subject of putting stickers on other people's lockers. In fact, there is no evidence that Vanderslice mentioned stickers other than the union stickers. Another difference is Vanderslice also says the admonition was triggered by a now unknown employee who was annoyed that someone had posted a union sticker on his locker.

Given the differing testimony, the question becomes whether the employee version or Vanderslice's version is more plausible. First, I note that Barger and Phillips testified consistently with one another regarding what they recall Vanderslice said. They remember him prohibiting union stickers on lockers, saying stickers defaced company property and were more appropriate on automobile bumpers. In fact Vanderslice agrees with that part of their testimony. I also note that Vanderslice's testimony about the meeting is uncorroborated. Furthermore, he had communicated with the human resources department and Director Copeland had given him some instructions regarding how to deal with union flyers and stickers.

Vanderslice says the incident was important enough to have caused him to include it in his March 29 talk. However, he could not recall which employee had complained about the sticker on his locker. His lack of recall on the point seems entirely too convenient. Had he given a name, undoubtedly that individual would have been asked about the incident. Yet, if that person did not confirm, Vanderslice's dissemblance would have been revealed. Memory loss was a better choice for Vanderslice to try to sustain his story, as it risked no backfire from anyone else. Despite the incident's importance, Vanderslice pleaded lack of recall because the incident was so "minor." He can't have it both ways. Either the incident was significant enough to remember or it wasn't. If it were, the complaining employee's name would have been easily recalled. What's more, Vanderslice's raising the 'defacement' issue says too much. Stickers had defaced that entire locker room for years. How could a 2" x 3" sticker do more than had already been done? And, defacement was not an issue for "other people's lockers," although annoying others with such a prank might be. Why was defacement even raised? It was a long-dead issue. And, why connect the 'defacement' to discipline since no one was ever disciplined for placing a sticker on a locker? Vanderslice did address the 'annoyance' factor, but seems to have said more than was necessary when he included defacement.

All these factors suggest that the entire 'complaint' by the unremembered employee was fabricated from whole cloth. Indeed, I find Vanderslice's testimony to be not worthy of credit. But even if I credit him, his admonition makes little sense. Why limit it to 'union' stickers? If people were placing unwanted stickers on other people's lockers, the message on the sticker was of no concern. It was the prank itself that was the problem. Defacement and union message had nothing to do with the prank. Instead, union stickers were singled out from hundreds of others and connected to an unprovable complaint made by a disremembered employee.

Frankly, this does nothing to place Vanderslice's testimony into the realm of plausibility. Instead, his testimony is consistent with an effort to deflect and deny the truth. And, both Barger and Phillips have reported that truth. I find Vanderslice's testimony that his admonition was aimed at other people's lockers not worthy of belief. I therefore find that Vanderslice told employees at the March 29 meeting that they could not place union stickers on their lockers.

Given the fact that hundreds of other stickers were permitted on the lockers, I find Respondent's approach to union stickers to have been discriminatory. The only distinction between the union sticker and the others was that this one carried a message to employees aimed at persuading them to obtain union representation. Therefore, Vanderslice's instruction interfered with, restrained, and coerced its employees in the exercise of their right to communicate with each other about the benefits of union representation. Respondent violated Section 8(a)(1) as alleged.

The Evaluations

The Mountain evaluates its instructors twice each ski season. The first is mid- to late-February and the second toward the end of the season, usually April. Respondent uses a form known as the "KRA" form (standing for "key result area") as its standard review tool. This form has five principal topics, four of which are further subdivided. From the top of the form down, the five are: guest relationships, professional skills, attitude, reliability and productivity.

Guest relationships is subdivided into communication, relationships and meeting place. Professional skills has five subcategories, all related to skiing skills and are not in issue here. Attitude, the principal main topic under scrutiny here has three subcategories, team player, flexibility and instructor's attitude towards our school. The last two main topics, reliability (attendance and appearance) and productivity (a math calculation dealing with revenue generation) are not in issue, either.

Each of the subcategories is accompanied by a description of what the Mountain expects from its instructors. "Team Player," for example, requires information about whether the instructor "shares helpful information, supports our team and promotes positive morale at work."

Each subcategory is assigned a numerical value from 1 to 10, 10 being high. Five is the 'meets expectations' level. Less than 5 means the employee needs improvement; the lower the score, the more improvement is needed. A 1 would mean "unsatisfactory" and would mean the employee's job was in jeopardy. The numerical values for each subcategory are averaged and become the total KRA score.

In the upper right hand corner of the form is a conclusion to be circled by the employee's "family" supervisor. "Rehire: Yes. No." This entry seems to be used after the April evaluation and is used to determine whether the employee is to be rehired the following season. The human resources department reviews the recommendation made on that entry.

The form itself is the product of the input from at least five family leaders. Thus, although a specific instructor may belong to a named supervisor's family, nevertheless, all supervisors are asked to fill out a KRA evaluation form for every instructor at the lodge. Their figures are given to the office where they are consolidated into one KRA form to be shown each employee by his or her own supervisor during the interview portion of the process. The raw records have not been retained; there may be a computer spreadsheet tabulation somewhere, but Respondent's counsel stated it no longer exists and he reported he could not produce it, though under subpoena.

There is really no issue regarding Respondent's knowledge of Phillips' and Barger's union activities or the fact that employees were embarking upon an organizing drive. Supervisor Cara Leonard said in January (more likely early February), Jack Copeland, the human resources director, sent out an e-mail advising supervision that such a drive was underway listing some employees who were known to be involved. Underkoffler said he never got such an e-mail, but does acknowledge being notified of Phillips' involvement (perhaps through seeing the Union's letter of February 3). Leonard said the drive resulted in a training program; Vanderslice says he received some verbal "do's and don'ts" training with respect to union organizing.

Moreover, as noted earlier, Phillips' name was one of the five listed in the Union's February 3 letter. And, at the end of March, by another letter, the Union added Barger's name to its list of employee organizers.

On February 23, about 3 weeks after the first letter, Underkoffler gave Phillips his mid-season evaluation. For the first time during his 11 years with Respondent, Phillips received a less than satisfactory rating for the team player subcategory under attitude. His numerical rating was '4.' The year before, he had received an '8' on each of the two evaluations. Furthermore, no supervisor told him prior to February 23 that his attitude was becoming a problem. Curiously, the average of all three subcategories for attitude was calculated at 4.1, despite the fact that he received a '4' and two '5's'. The correct average for those three subcategories is 4.66. There is no explanation for that discrepancy.

During their discussion that day, Underkoffler acknowledges he told Phillips that he had received the '4' "because of what you've been doing." Although he offered no further explanation of that remark, Phillips concluded Underkoffler was referring to his organizing endeavors.

Due to a loss of memory, Phillips was unable to testify about what was said, but his recollection was recorded the very next day by Pam Mitchell, who wrote down what Phillips remembered from the day before.[6] The recorded recollection states, in pertinent part:

> On Sunday, Feb. 23, 2003, I met with Carl Underkoffler, my supervisor, to review my KRA.
>
> When we reviewed the box labeled 'Attitude,' under 'Team Player,' Carl said, as he pointed to that area, "This score is probably because of what you've been doing." I know he was referring to my union activity. Then, after the fact, we discussed why I'd be supporting a union. [Illegible word, perhaps a scratch-out] Carl said, "I want Briant Phillips to be working at getting more privates [private lessons] and putting more money in his pockets." "I just don't understand why Briant Phillips doesn't work at getting more privates, instead of doing what he's doing." He was referring to [my] union work.
>
> "You're in this beautiful work place, so why would you want to be doing what you're doing?"
>
> Carl also said, "I'd never be [in] a union."

The only real difference between Phillips and Underkoffler's version is that Underkoffler puts his "because of what you've been doing" comment in a different context. Underkoffler agrees he said the words. Indeed, the two are also in agreement about Underkoffler's reference to wanting Phillips to increase the number of private lessons he was getting. Private lessons benefit both the Mountain and the instructor and, concomitantly, improve the 'productivity' level of each instructor. Underkoffler also testified he believed that the score of 4.1 was generous. ("I told him with the behavioral things that you come to school with because of—because of performance is-

[6] GC Exh. 9 was received as past recollection recorded.

sues that you have in the job, I felt that that was a very generous score.") Apparently, in Underkoffler's estimation, the math error against Phillips wasn't low enough.

Underkoffler asserted that the "what you are doing" comment was aimed at some of Phillips' shortcomings as an instructor. Specifically, he said that Phillips did not demonstrate a desire to meet and greet guests in the meeting area, did not learn the guests' names, and was not contributing to a positive morale in the workplace. He also said that Phillips' declining to teach children was an issue. The last, declining to teach children, is an odd commentary. In the abstract it sounds as a valid complaint. Yet Underkoffler agrees that Phillips had been given the choice not to teach children and that Phillips had accepted the option. If given an option, and the option is accepted, it seems anomalous to downgrade the employee's work on that basis. Phillips, no doubt accurately, assessed teaching small children as being out of his comfort zone. Without doubt, moreover, he is not the only instructor who does better with teens or adults. Why then does Underkoffler use Phillips' exercise of a granted discretion against him? More importantly, why did it become part of the attitude category? Isn't it more properly the province of guest relationships? The same can be said for Phillips' alleged inability to remember students' names.

During the hearing, counsel for the General Counsel discovered that Underkoffler had used a document to prepare his testimony. It is in evidence as CP Exh. 1. The document, undated, is Underkoffler's written response to the human resources department which had asked for information to respond to the unfair labor practice charges. In the document, Underkoffler writes:

> Mr. Phillips miss-understood [sic] my comment 'because of what you['re] doing.' It is because of what he does not do and his behavior that gave him the scores he received. He does not make an effort to approach guests, does not want to teach children, *constantly pursues his union activities with staff even after they tell him they want nothing to do with it, does not promote positive morale at work*, has little concern about the quality of the lessons we teach and only accepts work willingly in the adult area. Having this kind of behavior and attitude a 4 is a generous score. (Italics supplied.)

Underkoffler's testimonial omission of Phillips' union activities as a concern is striking. Almost equally striking is Underkoffler's sequential connection of Phillips' union activities to his failure to promote positive morale at work. Not only does this document demonstrate that Underkoffler tailors his testimony to skip over Phillips' union activity as a concern, it also demonstrates that he equates Phillips' perseverance concerning union representation with disruptiveness. Yet, assuming Phillips was not interfering with the work of others (there is no such evidence), his doggedness in pursuit of authorization cards or the joinder of others was protected by Section 7. As the Supreme Court has said, "The place of work is a place uniquely appropriate for dissemination of views concerning the bargaining representative and the various options open to the employees." *NLRB v. Magnavox Co. of Tennessee*, 415 U.S. 322, 325 (1974). Underkoffler's reasoning diminishes and devalues this statutory right. Phillips had a Congressionally approved right to proceed as he did; his fellow employees have the same right to accept or reject Phillips' overtures.[7] It is really none of the Employer's business to insert itself in that process. Yet, Underkoffler used whatever employment ripples Phillips' organizing may have caused among his fellows (if in fact there were any), to assert that it amounted to a morale issue which redounded against the employee who was exercising an employment right. Underkoffler's thinking is entirely suspect.

On April 16, Underkoffler gave Phillips his season end evaluation. His team player level remained at '4,' but his "attitude towards our school" fell from '5' to '4.' As a result, his overall average for that category became 4.3. Either way, these scores were a significant contrast to Phillips' mid-season 2002 average of '8' while under the supervision of a different supervisor.

The evaluation interview took place at the end of the day in the "Canyon Kids" room where instructors were logging out. Underkoffler chose one of the picnic style tables as the location. It was not a private place, but no one actually overheard the conversation. Nevertheless, Phillips was happy with neither his score nor the location. He could see Snowboard Supervisor Jeff Smith (who he inadvertently said was Jeff Nelson) at a nearby table talking to other instructors. Smith was checking instructors in at day's end.

It is not clear how long Underkoffler and Phillips spoke together. Neither described a specific time period. Smith, not a party to the conversation, did note that it became, if not heated, at least uncomfortable. Phillips says Underkoffler became heated after he signed the KRA form; Underkoffler says Phillips became heated when he saw the score. Smith estimated the two were in the room no longer than 5 minutes. He saw Phillips leave and Underkoffler looking on.

Phillips says that there was very little discussion between them. Underkoffler gave him the evaluation form. He looked it over, saw that his score was lower than before, signed it and added the phrase "under protest" and gave it back. Underkoffler looked at the comment and said, "Did your friend teach you how to do this or show you how to do this?" Phillips took him to mean Pam Mitchell and chose not to respond. Initially, he said nothing else transpired, but on cross he remembered Underkoffler asked him to explain why he signed under protest. Phillips replied he didn't want to discuss it in the middle of the Canyon Kids room, given all the people who were nearby. Phillips says Underkoffler then stepped back and the meeting was over. Underkoffler says Phillips walked away before he had the chance to explain why Phillips had received the low score. Underkoffler testified he had a package of complaints with him for that purpose. At least one of those had occurred so recently it could not have been part of Phillips' KRA tabulation. That one, as well as the others, had to do with guest complaints and comments. These, of course, referred to the guest relationships category, not the attitude section.

As a result of this encounter, Underkoffler circled the 'Rehire: No' recommendation in the upper corner.

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[7] Indeed, Respondent has never contended that Phillips or Barger exceeded the bounds of proper behavior when approaching other employees to join them in obtaining union representation.

Supervisor Cara Leonard gave Dennis Barger his end of season evaluation on April 25. All of the subcategories, except team player, were either '5' or '6.' Team player, however, was a '4.' His previous evaluation, given by Leonard on February 18, listed team player as a '6.' In fact, Leonard had remarked on the earlier form that "Dennis is a reliable instructor with a great attitude!" This raises the question of what happened during the next 9 weeks to change the rating so severely. As noted, on March 31, the Union had written Respondent a letter advising that Barger had become an employee organizer. In addition, he had repeatedly reposted a union sticker on his locker. Moreover, Leonard observed him wearing a union button. So far as the record shows, he was the only instructor to have done so.

Leonard testified about the explanation she gave Barger:

> As we were finishing up, he looked at the—you know, he looked at all the scores, and I asked him if they made sense. He understood why he had those scores. And he said, I don't understand why I have a 4 under team player. And I said, the reason for that has to do with the way—I have—we as a supervising body have received complaints that you are pressuring people with—you know, you have a high pressure sales tactic for the Union. And then I said to him, I personally—I think I speak for the other supervisors, don't care if we're represented by a union or not. Honestly, it's up to the instructors to vote for it, but what bothers me is that there's friction amongst the staff and maybe you can re-think how you present the information.
>
> And it was really—and I did just to make him aware of what I had heard.

Leonard said, and I do not doubt her, that on a personal basis she did not care one way or the other about whether employees wanted union representation. It was not something that really concerned her. Nevertheless, she explained to Barger that the reason he had gotten a 4 for team player was because of his supposed 'high pressure' organizing tactics. Initially, on direct examination she said she was aware of some employee complaints about that, but couldn't remember much about it. She was unable to identify which employees did so or when they did so. Then, when I pressed her, she said the two employees were Steve Erlanger and Brent McKenzie. Even so, their complaints were not made to her; she heard about them from other supervisors. I therefore barred her testimony about what the complaints were, for she had no personal knowledge. See Fed.R.Evid. 602, which requires a witness to have personal knowledge of an event.[8] Thereupon, Respondent made no effort to call a witness who did have personal knowledge, such as the supervisor(s) who actually fielded the complaints or the complaining employees themselves.

Thus, as matters stand, the only reason offered for the lower score is that there had been complaints regarding the manner of his union organizing. Yet, whatever the offensive manner may have been, it was never proven. Under that circumstance, I am unable to find that there was anything improper about the manner in which Barger performed his organizing duties. As with Phillips, he has the right to do it, guaranteed by Section 7 of the Act. Therefore, the only reason offered by Respondent for Barger's lowered score is that he was engaging in union organizing activity. Furthermore, he had done nothing to warrant loss of the statute's protection.

Clearly, the evidence demonstrates that the only reason the team player scores were lowered for both Phillips and Barger was because they had engaged in organizing activity which supervision regarded as inconsistent with the team player goal. In both cases, however, the activity was protected by statute and an employer may not downgrade an employee's performance on such a basis. Standing by itself that type of treatment may be seen to reasonably interfere with, restrain, and coerce employees and discourage them in the exercise of their right to seek union representation. It therefore violated Section 8(a)(1).

But it was actually more than that. Section 8(a)(3) states: "It shall be an unfair labor practice for an employer—by discrimination in regard to hire or *tenure of employment* or any term and condition of employment to encourage or discourage union membership in any labor organization . . . ." (Italics supplied.) This statute prohibits not only discriminatory hires, discharges and layoffs (hiring issues), but also matters which affect an employee's tenure. Thus, if an employer's discriminatory discipline is a warning of loss of employment, it will be prohibited by Section 8(a)(3) because it is a step reducing the strength of his or her tie to the job—a tenure matter. Even so, both Phillips and Barger were recalled (or scheduled to be recalled) for the 2003–2004 season.

Respondent, in its legal argument asserts that the evaluations given here are not a tenure matter because they are not an adverse employment action. Yet, the recommendation Underkoffler made with respect to Phillips (circling the 'Rehire: No' option) belies the contention. These evaluations are more than simple feedback. In fact, they are one of the factors to be relied upon when a discharge or rehire decision is being made. The concept of 'adverse employment action' is actually one arising from civil rights statutes and does not perfectly match the NLRA. Indeed, while Section 8(a)(3) specifically contains the 'hire and tenure' phrase, the Title VII language is more limited. Nevertheless, it does utilize language from which the 'adverse employment action' concept arises.[9] Therefore, a violation under Section 8(a)(3) of the NLRA can be made out without concern for lost pay; the only requirement is eroding the employee's tenure. Such erosion clearly occurred here and that

[8] Rule 602 "*Lack of Personal Knowledge*. A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." [Additional portion of the rule omitted as not pertinent.]

[9] Section 703 of the Civil Rights Act of 1964 (42 U.S.C. §2000(e)-2 states: (a) It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin; (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

lessening was due to the employees' protected conduct. Therefore, Respondent's legal argument concerning the General Counsel's failure to show an adverse employment action is without merit.

Accordingly, I find Respondent to have violated the Act as alleged in the complaint.

THE REMEDY

As Respondent has been found to have engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. In addition, Respondent shall be directed to post a notice to employees advising them of their rights and describing the steps it will take to remedy the unfair labor practices which have been found.

Based upon the foregoing findings of fact, legal analysis, and the record as a whole I hereby make the following

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce and in a industry affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Union of Operating Engineers, Local Union No. 12, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent, acting through Supervisor Mark Spieler violated Section 8(a)(1) of the Act when it told an employee that union representation would mean lost earnings opportunities which would favor more senior employees or union organizers/stewards.

4. Respondent, acting through Supervisor Christian Vanderslice, violated Section 8(a)(1) of the Act when he barred employees from placing stickers on employee lockers and threatened them with discipline for doing so in circumstances where other types of stickers were permitted.

5. Respondent violated Section 8(a)(3) and (1) of the Act when its supervisors lowered the periodic employee evaluations of employees who had engaged in union organizing activity.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[10]

ORDER

Respondent, Mammoth Mountain Ski Area, Mammoth Lakes, California, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Threatening employees with lost earnings opportunities in the event of union representation by asserting that union representation would favor more senior employees or union organizers/stewards.

(b) Barring employees from placing union stickers on employee lockers and threatening them with discipline for doing so in circumstances where other types of stickers are permitted.

(c) Lowering the periodic employee evaluations of employees who have engaged in union organizing activity.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act

(a) Within 14 days from the date of this order rescind those portions of Briant Phillips' February 23 and April 16, 2003, and Dennis Barger's April 25, 2003 evaluation forms relating to team player and within 3 days thereafter notify them in writing that this has been done and that the evaluations will not be used against them in any way.

(b) Nothing in paragraph 2(a) shall be construed to prevent Respondent from re-evaluating the employees in question in a nondiscriminatory manner.

(c) Within 14 days after service by the Region, post at its ski resort in Mammoth Lakes, California, copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 32 after being signed by Respondent's authorized representative, shall be posted by Respondent during the ski season[12] and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, it shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by it at any time since February 23, 2003.

Dated, San Francisco, CA April 21, 2004

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[12] See *Trident Seafood Corp.*, 293 NLRB 1016, 1017 (1989), enfd. 101 F.3d 111 (D.C. Cir. 1996), which in seasonal industries requires posting during peak employment periods.

Choose not to engage in any of these protected activities.

WE WILL NOT threaten you with lost earnings opportunities in the event of union representation by telling you that union representation will reward the more senior employees, the employees who served as union organizers or those who might become union stewards.

WE WILL NOT bar you from placing union stickers on employee lockers or threaten you with discipline for doing so in circumstances where other types of stickers are permitted.

WE WILL NOT lower the periodic employee evaluations of any employee who has engaged in union organizing activity on behalf of International Union of Operating Engineers, Local Union No. 12, AFL–CIO or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you if you choose to exercise the rights listed above which are guaranteed by Section 7 of the National Labor Relations Act.

WE WILL rescind those portions of Briant Phillips' and Dennis Barger's 2003 evaluation forms which we unlawfully downgraded and WE WILL notify them in writing that we have done so and tell them that those evaluations will not be used against them in any way.

MAMMOTH MOUNTAIN SKI AREA